80-845

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

KAUFMAN INVESTMENT CORPORATION,
a California corporation,

Petitioner.

v.

CARLOS P. JOHNSON, EMMER L. JOHNSON, JOAN BUEERMANN, DONALD H. BUEERMANN, STONEGATE FARMS, INC. and JOHNSON-BUEERMANN INVESTMENT CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The petitioner Kaufman Investment Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Ninth Circuit entered in this proceeding on June 30, 1980, and in support thereof states:

QUESTION PRESENTED

Whether in an action for rescission based upon fraud it is improper under Federal Rule of Civil Procedure 56 to enter summary judgment against the plaintiff notwithstanding the existence of a dispute as to material facts raised on the record below.

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. Said opinion sets out in quotation substantially all of the opinion of the District Court for the District of Oregon.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 30, 1980. A timely petition for rehearing was denied on August 8, 1980, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 56(c) [in pertinent part]:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

The instant case centers around a contract to sell and a mortgage agreement entered into on or about September 4, 1973 as to certain real property in the State of Oregon. The property, consisting of approximately 200 acres of undeveloped land, is located roughly 20 miles south of Oregon City, Oregon in the County of Clackamas, and is commonly referred to as the "Stonegate Farms". The purchase price for the property was $656,000.00. The original sale was between respondents Emmer L. Johnson, Joan Bueermann, Donald H. Bueermann, Stonegate Farms, Inc. and Johnson-Bueermann Investment Comppany, a partnership (collectively hereinafter referred to as "Johnson-Bueermann"), as vendor, and K.B.H. Ranch, Inc., an Oregon corporation (hereinafter referred to as "KBH"), as vendee. Petitioner herein, Kaufman Investment Corporation, a California corporation (hereinafter referred to as "KIC"), thereafter succeeded to all right, title and interest of KBH as to said mortgage agreement.

In late 1976, KIC became aware, for the first time, that the Columbia Regional Area Governments ("CRAG") was shortly to adopt a comprehensive plan restricting the use of the Stonegate Farm to rural purposes only, which

plan had been in the making, and in effect on an interim basis, for a period of four or more years. Upon learning of same, KIC ceased making payments under the original mortgage agreement, and shortly thereafter, in January, 1977, instituted an action for rescission and/or fraud in the District Court of Oregon. At the time of instituting this action, KIC had, according to the pleadings, paid a total of $156,917.54 against the purchase price, and remained liable for a balance of $504,896.74. Additionally, KIC had expended over $6,000.00 in improving the property.

The grounds for petitioner's rescission action was that the respondents had induced KIC's predecessor in interest to purchase the property and KIC to assume that agreement on the false and knowingly false representations that the purchase property was then and would in the future be open to development as a high density residential project. Johnson-Bueerman answered denying the allegations and cross-complained for a judgment of strict foreclosure, KIC having not tendered any payment pursuant to the mortgage agreement since the time of discovery of its grounds for rescission. Respondents thereafter filed a Motion for Summary Judgment in their favor on both the Complaint and the Cross-Complaint for foreclosure.

After hearing, the District Court entered an order of summary judgment against petitioner and granted respondents' Motion for Summary

Judgment on their counterclaim. The Order of the District Court was signed and approved on or about September 20, 1977, and Notice of Appeal from that Order was filed by KIC on or about September 26, 1977.

Petitioner established through its affidavits that Johnson-Bueermann made certain representations with regard to the commercial uses to which the property could be put at the time of the sale. The affidavits further established that these representations were relied upon by the purchaser and were material to its decision to purchase the property. Further, facts were averred which would reasonably support the inference that Johnson-Bueermann knowingly and intentionally misstated the true facts as to the commercial uses of the property.

The District Court granted summary judgment to respondents on the legal ground that the representations allegedly made could not support an action for rescission. Specifically, the District Court felt that the petitioner was not entitled to rely upon the representations made by respondent; and even if they were entitled to rely upon them, the representations made were not actionable because they related to the conduct of third parties. See pp. 2-5 of Appendix hereto.

The Court of Appeals affirmed the decision of the District Court. The Court of Appeals principally relied upon the rationale that because the

original purchaser, KBH, had hired an appraiser at the time of the purchase, no issue as to the actual reliance of the purchaser on the misrepresentations of the respondents was present on the evidence. See p. 9 of the Appendix hereto. In short, the Court of Appeals accepted the reasoning of the District Court that there was no material issue of fact as to the actual reliance of the original purchasr. Petitioner's contention, simply put, is that in so holding, both the District Court and the Court of Appeals misapplied the well-settled standards of Federal Rule of Civil Procedure 56 relating to the grant of summary judgment motions.

REASON FOR GRANTING THE WRIT

The decision below incorrectly applies the standards of Federal Rule of Civil Procedure 56 relative to the granting of summary judgment. The opinion of the Ninth Circuit Court of Appeals correctly recognized that under Oregon law (which is controlling in this diversity action), opinions or promises as to future actions can serve as a basis for fraud. Slocum v. Laffler, 538 P.2d 906, 908-09 (1975). It is additionally clear under Oregon law that misrepresentations by a vendor at the time of sale as to the uses to which real property can be put can constitute a basis for fraud. Gamble v. Beahm, 198 Or. 537, 257 P.2d 882 (1953), Farnsworth v. Feller, 256 Or. 56, 471 P.2d 792 (1970).

The Court of Appeals, as the District Court, placed much emphasis on the fact that petitioner's predecessor in interest retained the services of an appraiser in connection with its acquisition of the property. From this fact the Court of Appeals, as the District Court, concluded that there was no reliance in fact upon the misrepresentations of respondents, even assuming such misrepresentations to have been made.

The error in the Court of Appeals decision lies in the fundamental fact that there is nothing in the appraiser's communications to KBH (the purchaser) that undermines petitioner's contention that it in fact did rely on the misrepresentations of the respondents. What has happened instead is that the Court of Appeals, and the District Court, have improperly applied Rule 56 to grant summary judgment where it was deemed on the state of the affidavits that it was more likely than not that there was in fact no such reliance.

The appraiser's letter to KBH is set forth in full in the Opinion of the Court of Appeals, Appendix, pp. 4-6. Reference to that letter shows that while the appraiser generally discussed the value of the property and some obstacles to the development of it, nowhere does the report make mention of the impending drastic change in the regulatory treatment of this property. In fact, the report does nothing more than to recite that the property is zoned R1, and

indicates that a zoning density of one building per 20,000 square feet is permissible under the applicable zoning. The basis of petitioner's action is that under the CRAG plan, petitioner was not able to develop the property on any residential basis whatsoever, much less than one house per 20,000 square feet.

In short, there is nothing contained in the appraiser's letter that would put the petitioner on notice as to the matter which is the subject of this lawsuit.

In the context of a Motion for Summary Judgment pursuant to Rule 56, the moving party has the burden of showing the absence of a genuine issue as to any material fact and for these purposes, the material lodged must be viewed in the light most favorable to the opposing party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970).

In cases where intent, motive or state of mind are at issue, the court should be particularly cautious in granting a Motion for Summary Judgment. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir. 1970). Because actions for fraud involve the state of mind and intent of the parties, these principles as to the sparing use of summary judgment

procedures have found application by the courts. Associated Hardware Supply Co. v. Big Wheel Distrib. Co., 355 F.2d 114, 121 (3d Cir. 1966); F. S. Bowen Elec. Co. v. J. D. Hedin Constr. Co., 316 F.2d 362 (D.C. Cir. 1963).

In this case, the District Court, and the Court of Appeals, ignored these standards. In essence, the lower courts held that the retention of the services of an appraiser in connection with the purchase of the property ipso facto precludes actual reliance on the misrepresentations of the vendors. Yet, manifestly an issue of fact remains which should be properly resolved by the trier of fact in the context of a full trial, rather than by a "trial by affidavit" before the District Court judge. It is no doubt true that the fact that an appraiser was retained at the time of the purchase does nothing to help the petitioner's case in chief. But nevertheless, petitioner has strongly averred that the principals of the purchasing corporation in fact did rely upon the misrepresentations of the vendors at the time of sale. These averments, as noted above, were not directly contradicted by the appraiser's report.

In essence, then, the decision of the Court of Appeals, and the District Court below, to grant summary judgment was based not upon the absence of any material fact, within the meaning of Rule 56, but upon the court's belief, based upon the affidavits, that petitioner's chance of success at the

time of trial was remote. Petitioner submits most emphatically that that is not the standard under Rule 56 and that the entry of summary judgment against it has deprived petitioner of its right to present its case in the context of a full trial, with the opportunity for the trier of fact to observe the demeanor of the witnesses and to judge independently their credibility.

It is submitted that the issue raised by this petition falls directly within the prime responsibility of this court for the proper functioning of the federal judiciary. Specifically, petitioner relies upon this court's Rule 19 which recognizes the appropriateness of the grant of certiorari in a case, such as the instant case, where the federal appellate decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision". This court has many times recognized the need for its exercise of its supervisory power in the context of the construction of the Federal Rules of Civil Procedure. Hickman v. Taylor, 329 U.S. 495 (1947); Upshaw v. United States, 335 U.S. 410 (1949); Schlagenhauf v. Holder, 379 U.S. 104 (1964). The extreme and serious departure from those standards revealed by the record in this case warrants exercise by this court of its jurisdiction to correct the manifest error below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

DATED: November 21, 1980.

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UNITED STATES COURT OF APPEAL
NINTH CIRCUIT

KAUFMAN INVESTMENT CORPORATION, a California corporation, Appellant, v. CARLOS P. JOHNSON, EMMER L. JOHNSON, JOAN BUEERMANN, DONALD H. BUEERMANN, STONEGATE FARMS, INC., a dissolved Oregon corporation, and JOHNSON-BUEERMANN INVESTMENT CO., a partnership, Appellees. v. K.B.H. RANCH, INC., an Oregon corporation, MAYFLOWER FARMS, an Oregon corporation, PERRY J. BRADFORD, JIM WOOD, dba WOODY'S AUTOMOTIVE and JOHN DOE, a lessee, Additional Defendants on Counterclaim.	NO. 77-3561 OPINION

Appeal from the United States District Court District of Oregon

Before: KILKENNY and WALLACE, Circuit Judges, and JAMESON, District Judge.*

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* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX

KILKENNY, Circuit Judge:

This is an appeal from a summary judgment in favor of appellees foreclosing a mortgage and a security agreement, and denying appellant's summary judgment motion for recision of the contract for the sale of the property and for damages on the grounds of fraud and misrepresentation. 1/

Our study of the pleadings and the affidavits in support of and against the respective motions for summary judgment convinces us that there is no genuine issue of material fact for trial and that Magistrate Leavy's deicsion as approved by the district court is fully supported by the record. The decision reads in pertinent part:

"On September 4, 1973, defendants [appellees] entered into a contract to sell certain land in Oregon known as Stonegate Farm to KBH Ranch, Inc., plaintiff's [predecessor] 1/ in interest. On October 22, 1974, the defendants, plaintiff [appellant] and KBH Ranch, Inc. entered into an agreement modifying the earlier contract. The plaintiff and KBH Ranch, Inc. made payments according to the terms of the contract rhrough October of 1976. No payments were made in November and December of 1976, or in January of 1977. On January 10, 1977, plaintiff filed this action in federal court.

1/ This is a diversity case and controlled by Oregon law.

1/ The magistrate mistaken referred to KBH Ranch, Inc. as plaintiff's "successor."

"Count I of plaintiff's complaint is an action for rescission, based on plaintiff's allegation that defendants made certain misrepresentations to plaintiff concerning the suitability of Stonegate Farm for subdivision development. In the alternative, plaintiff sues in Count II for fraud, alleging that at the time defendants made the alleged misrepresentations they either knew they were false or made them recklessly without knowledge as to their truth or falsity.

"Pointing to the fact plaintiff is in default, defendants have filed a counterclaim based on a mortgage and security agreement given by KBH Ranch, Inc. in connection with the sale of the property. Defendants also contend that plaintiff has converted certain items of personal property in which defendants have a security interest. Defendants now move for summary judgment on plaintiff's claims against them and on their own counterclaims.

"Whether the plaintiff seeks rescission based on a material misrepresentation, or damages based on fraud, it must prove as one of the required elements under either theory that it acted in justifiable reliance on the representations made by defendants. Dahl v. Crain, 193 Or 207, 229, 237 P.2d 939 (1951); Andrews v. Roy Motors, United Finance Company, 204 Or 429, 433, 283 P.2d 652 (1955); Brown et ux v. Hassenstab et ux, 212 Or 246, 254 (1957).

"As defendants' exhibit B shows, Harrison Hertzberg, agent and attorney

for KBH Ranch, Inc., expressly stated KBH Ranch, Inc. was negotiating on the basis of its own appraisal report. That report discusses the issues of zoning and governmental regulation extensively, stating in part as follows: [Emphasis supplied.]

> 'The property is located in the Clairmont Water District. The superintendent is Mr. Bob Swanson, telephone 503-656-7240. There is a current moratorium on any further water hookups due to lack of supply. Principal source of water for the Clairmont Water District is Oregon City on a "surplus" basis and the State Board of Health has declared there is no further surplus water available. According to Mr. Swanson, the Oregon City filtration plant could be doubled in capacity but would require a bond issue. A proposed tax revision plan for the state of Oregon was voted down in a special election held May 1, 1973 and the future of many projects including the subject are somewhat clouded at this point in time. There appears every reason to believe that pressures and the demand for land can resolve some of these problems in the foreseeable future. The District is currently drilling a 16" well and the outcome of this project is not known at this time.
>
> 'The property is zoned R-20 permitting single-family residential on minimum lot size 20,000 sq. ft. Any development is subject to percolation tests which must be conducted

by the Soil Scientist, Mr. Bill Dolk, located in the Public Works Building at the Clackamas County shops near Oregon City. Determination of subsurface drainage takes precedence over zoning and it is possible that soil tests would require even larger than 20,000 sq. ft. lots.

'The possibility of a sewer district being formed appears remote at this time. The natural drainage would be in the direction of Aurora near the Willamette River which would necessitate formation of a sewer district and pressures for such a development are probably not strong enough to develop an overall sanitary system in the immediate foreseeable future. The Clackamas Community College located just a short distance north of the subject property is connected to the Oregon City sewer system by a pressure line but is exclusive to the institution and not available to other users.

'There is a possibility an individual disposal plant could be developed providing the size of the property would justify the heavy capital outlay presumably with an outfall into Beaver Creek. This possibility should be explored thoroughly by a qualified engineering firm and such a project would be subject to approval of the State Department of Environmental Quality, commonly known as DEQ.

'In summary, I feel this is a choice parcel for residential development and its total size would certainly suggest a planned unit development which would entail clustering the units in the most attractive area and most suitable for the sanitary system. It is possible one or more of the existing outbuildings could be salvaged for a central recreational area. Negative factors are uncertainty of water supply and sewage disposal.' [Emphasis supplied.]

"Mr. Hertzberg's admission, coupled with this detailed analysis, demonstrates that KBH Ranch, Inc. could not have acted in justifiable reliance on the alleged misrepresentations by defendants. Thus, an element essential to both of plaintiff's claims is absent.

"In his affidavit submitted in opposition to defendants' motion for summary judgment, Harvey R. Kaufman, president of plaintiff and a former equity holder in KBH Ranch, Inc., states that KBH Ranch, Inc. relied on its own appraisal report only as to the existing market value of the property, and relied on the predictions of defendants as to the prospective uses of the property and its potential for high density residential development.

"The specific governmental regulation which allegedly rendered the defendants' predictions erroneous is the comprehensive plan adopted by the Columbia Regional Association of Governments (CRAG) on December 22, 1976, more than 3 years after the alleged fraud and misrepresentation

took place.[1] The rule in Oregon is that fraud or misrepresentation cannot be premised upon erroneous predictions or opinions relating to future actions or events such as the conduct of independent third parties. CIA. Estrella Blanca, Ltda. v. S. S. Nitric, [sic] 247 F Supp 161, 171-172 (D. Or. 1965), aff'd 368 F2d 575 (9th Cir. 1966); Ball v. Associated Oil Co., 151 Or 383, 390, 50 P2d 125 (1935).

"For the reasons given above, defendants' motion for summary judgment should be granted and judgment should be entered for defendants on plaintiff's claims. Defendants' motion for summary judgment on their counterclaims should also be granted, and the case be set for a hearing to determine the terms of the decree."

Appellant's arguments to the contrary notwithstanding, the principal claims of appellant are with reference to future actions or events that might occur. The comprehensive plan of the Columbia Regional Association of Governments (CRAG) of which appellant complains was not in force and effect at the time the alleged misrepresentations were made and did not become effective for more than three years after the alleged fraud and misrepresentation had taken place. True enough, appellant strenuously argues that appellees misrepresented the existing regulatory climate. We note, however, that the county in which the property was located did not endorse the CRAG preliminary interim policy statements until some time

(1) This was also one month after the plaintiff had gone into default.

after the contract for the sale of the property was made and that CRAG did not officially approve its own interim plan until three months after the parties entered their contract. Under Oregon law, opinions or promises as to future actions cannot serve as a basis for fraud or misrepresentation unless it is shown that the party acted in justifiable reliance on the representations. CIA ESTRELLA BLANCA, LTDA. v. S. S. NICTRIC, 247 F. Supp. 161. 171-172 (D. Or. 1965), aff'd. 368 F.2d 575 (CA9 1966); Ball v. Associated Oil Co., 151 Or. 383, 390, 50 P.2d 125 (1935).

A good definition of the elements of fraud in Oregon is stated by us in Equitable Life & Casualty Co. v. Lee, 310 F.2d 262, 267 (CA9 1962). The case follows the statement of the Oregon Supreme Court in Conzelmann v. Northwest Poultry & Dairy Products Co., 190 Ore. 332, 350, 225 P.2d 757, 764 (1950).

Elements of actual fraud consist of: (1) a misrepresentation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon by a person and in a manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. Equitable Life & Casualty, supra, at 267.

It is manifest that appellant did not rely on any representations by appellees regarding the zoning status of the property, Appellant secured the

services of a local real estate appraiser and counselor [agent] to examine and determine the value of the property in which it was interested. The agent rendered a thorough report on the factors affecting the value and development of the property, including the existing zoning regulations and the obstacles to development. A letter from the purchaser's attorney clearly indicates that the purchaser was negotiating on the baiss of its own agent's evaluation of the property and not on the appellee's representations. Needless to say, any knowledge of the embryonic land-use proposals possessed by this competent agent would be attributed to the purchaser.

Consequently, on the record before us, there could be no "justifiable reliance." It is manifest that appellant's claim of "negligent misrepresentation" would fail for the same reasons that precludes his claim on fraudulent misrepresentations.

This is one of those cases where it would be a complete waste of judicial time to remand for a trial. Where it is apparent at the hearing on the motion for summary judgment that the moving party would be entitled to a directed verdict if the case were to proceed to trial, summary judgment is in order. Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 344 (CA9 1978). Viewing all of the evidence before the court and the inferences which might be drawn therefrom in the light most favorable to the appellant, the appellees would be clearly entitled to prevail as a matter of law. Ruffin v. County of Los Angeles, 607 F.2d 1276, 9.

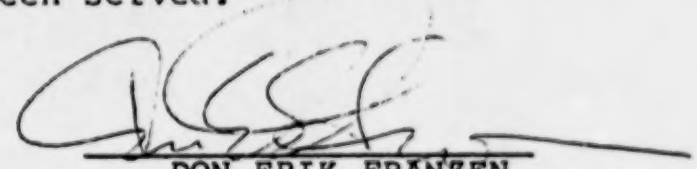
1279-80 (CA9 1979); Stansifer v. Chrysler Motor Corp., 487 F.2d 59, 63 (CA9 1973). In these circumstances, summary judgment in favor of appellees was proper.

The judgment of the district court must be affirmed.

IT IS SO ORDERED.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to James N. Westwood, Esquire of Miller, Nash, Yerke, Wiener & Hager, 900 S.W. Fifth Avenue, Portland, Oregon, counsel for respondents. I further certify that all parties required to be served have been served.



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